

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

Revision of No Contest Clause Statute

April 2007

The purpose of this tentative recommendation is to solicit public comment on the Commission's tentative conclusions. A comment submitted to the Commission will be part of the public record. The Commission will consider the comment at a public meeting when the Commission determines what, if any, recommendation it will make to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made to it.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN July 15, 2007.

The Commission will often substantially revise a proposal in response to comment it receives. Thus, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739
650-494-1335
<commission@clrc.ca.gov>

SUMMARY OF TENTATIVE RECOMMENDATION

In this tentative recommendation, the California Law Revision Commission analyzes the advantages and disadvantages of enforcement of a no contest clause in a will, trust, or other estate planning instrument. The analysis includes discussion of the treatment of no contest clauses in other jurisdictions.

The Law Revision Commission finds that there are good policy reasons to enforce a no contest clause.

However, the existing statute has become overly complex and is contributing to uncertainty as to whether a particular no contest clause would apply to a contemplated action. That uncertainty has led to widespread use of the declaratory relief procedure, adding a new layer of litigation to contest cases.

A no contest clause can also operate to deter legitimate inquiry into cases of elder financial abuse and fraud. An abuser may coerce or trick an elderly person into amending an estate plan to include a gift to the abuser, combined with a no contest clause. If the other heirs contest the gift, they risk losing their own inheritances. That can insulate fraud from effective judicial review.

After weighing the advantages and disadvantages of the no contest clause, the Commission recommends that enforcement of a no contest clause be preserved, but that the statute be significantly simplified. Complex provisions exempting most “indirect contests” from the enforcement of a no contest clause would be replaced with a simple rule limiting the enforcement of a no contest clause to a specified list of traditional “direct contests.” That simplification would significantly reduce uncertainty about the operation of a no contest clause. The declaratory relief provisions could then be deleted as unnecessary.

An existing exception to enforcement for certain types of contests that are brought with probable cause would be generalized to apply to all direct contests. That would provide a greater opportunity for heirs to bring a contest based on suspected elder abuse, without the fear of forfeiting their own inheritances.

This recommendation was prepared pursuant to Resolution Chapter 122 of the Statutes of 2005.

REVISION OF NO CONTEST CLAUSE STATUTE

1

BACKGROUND

2

A no contest clause (also called an *in terrorem* clause) is a provision inserted in a will, trust, or other instrument to the effect that a person who contests or attacks the instrument or any of its provisions takes nothing under the instrument or takes a reduced share. Such a clause is intended to reduce litigation by persons whose expectations are frustrated by the donative scheme of the instrument.¹

7

The Legislature has directed the Law Revision Commission to prepare a report weighing the advantages and disadvantages of enforcing a no contest clause in a will, trust, or other estate planning instrument.² In preparing the report, the Commission is to do the following:³

11

Review the various approaches in this area of the law taken by other states and proposed in the Uniform Probate Code, and present to the Legislature an evaluation of the broad range of options, including possible modification or repeal of existing statutes, attorney fee shifting, and other reform proposals, as well as the potential benefits of maintaining current law.

16

This tentative recommendation discusses the arguments for and against the enforcement of a no contest clause, the approach to enforcement taken in California and in other states, and problems that have arisen under the California statute. It concludes with a recommendation for changes to the existing statute. The contents of this tentative recommendation are as follows:

21

CONTENTS

22

POLICIES FAVORING ENFORCEMENT 2

23

Effectuating Transferor’s Intent..... 2

24

Avoiding Litigation..... 3

25

Avoiding Settlement Pressure 4

26

Use of Forced Election to Avoid Ownership Disputes..... 4

27

Continuity of Law 5

28

POLICIES FAVORING NON-ENFORCEMENT 5

29

Access to Justice 6

30

Forfeiture Disfavored..... 6

1. The basic law that governs enforcement of a no contest clause was enacted in 1990, on the recommendation of the Law Revision Commission. See *No Contest Clauses*, 20 Cal. L. Revision Comm’n Reports 7 (1990). It has been amended several times since enactment, adding a lengthy and complex set of exceptions to the enforcement of a no contest clause. See 1994 Cal. Stat. ch. 40; 1995 Cal. Stat. ch. 730; 2000 Cal. Stat. ch. 17; 2002 Cal. Stat. ch. 150; 2004 Cal. Stat. ch. 183.

2. See SCR 42 (Campbell), enacted as 2005 Cal. Stat. res. ch. 122.

3. *Id.*

1	Judicial Action Required to Determine or Implement Transferor’s Intentions	6
2	Judicial Supervision of Fiduciary	8
3	Misuse of Forced Election.....	8
4	DIFFERING APPROACHES TO ENFORCEMENT OF NO CONTEST CLAUSES	9
5	General Probable Cause Exception.....	10
6	Selective Probable Cause Exception	10
7	Specific Public Policy Exceptions	11
8	Special Rules of Construction	14
9	SUMMARY OF CALIFORNIA STATUTE	14
10	PROBLEMS UNDER EXISTING LAW	15
11	Uncertain Application.....	16
12	Excessive Litigation.....	18
13	Fraud and Undue Influence Shielded From Review.....	19
14	FEE SHIFTING ALTERNATIVE.....	20
15	Transferor Intention Disregarded.....	20
16	Deterrence Undermined.....	20
17	RECOMMENDATION	21
18	Statutory Simplification.....	21
19	Forced Election Precluded.....	22
20	Elimination of Declaratory Relief.....	22
21	Expansion of Probable Cause Exception.....	23
22	Grace Period	24
23	PROPOSED LEGISLATION	25

POLICIES FAVORING ENFORCEMENT

“No contest clauses are valid in California and are favored by the public policies of discouraging litigation and giving effect to the purposes expressed by the testator.”⁴ Those rationales for enforcement are discussed in more detail below.

Effectuating Transferor’s Intent

The law should respect a person’s ability to control the use and disposition of the person’s own property. That includes the ability to make a gift, either during life or on death. An owner may place conditions on a donative transfer of property, so long as the condition imposed is not illegal or otherwise against public policy:⁵

[The] testatrix was at full liberty to dispose of her property as she saw fit and upon whatever condition she desired to impose, so long as the condition was not prohibited by some law or opposed to public policy. The testatrix could give or

4. *George v. Burch*, 7 Cal. 4th 246, 254, 866 P.2d 92, 27 Cal. Rptr. 2d 165 (1994).

5. *Estate of Kitchen*, 192 Cal. 384, 388-89, 220 P. 301 (1923).

1 refrain from giving; and could attach to her gift any lawful condition which her
2 reason or caprice might dictate. She was but dealing with her own property and
3 the beneficiary claiming thereunder must take the gift, if at all, upon the terms
4 offered.

5 As noted, there will be situations in which a no contest clause is unenforceable
6 as a matter of public policy, notwithstanding the intentions of the transferor. See
7 “Specific Public Policy Exceptions” below.

8 **Avoiding Litigation**

9 There are a number of good reasons why a person would want to avoid litigation
10 contesting the person’s estate plan:

11 *Cost and Delay*

12 The cost of litigation depletes assets that were intended to go to the person’s
13 heirs. That is generally undesirable, but it can also have unexpected effects on the
14 relative value of the gifts given to different heirs. For example, where one heir is
15 given a specifically named asset and the other heir takes the residue of the estate,
16 litigation costs will disproportionately affect the second heir.

17 By deterring contest litigation, a no contest clause preserves the corpus of the
18 estate and the transferor’s plan for the disposition of those assets.

19 *Discord Between Heirs*

20 A dispute over the proper disposition of a decedent’s estate can pit family
21 members and friends against one another. The dispute may be protracted,
22 emotional, and destructive of important personal relationships.

23 A transferor may execute a no contest clause in order to avoid just that sort of
24 discord. For example, in *Estate of Ferber*,⁶ the transferor had served as the
25 personal representative of his father’s estate, which was open for 17 years. He did
26 not want his own representative to go through the same difficulties: “Due to his
27 angst over this state of affairs and its negative impact on his health and quality of
28 life, ... he directed his attorneys to prepare the strongest possible no contest
29 clause.”⁷

30 *Privacy*

31 A contest proceeding may bring to light “matters of private life that ought not to
32 be made public, and in respect to which the voice of the testator cannot be heard,
33 either in explanation or denial....”⁸ “Unless forfeiture clauses are given effect, the
34 resulting squabbles between disappointed kinfolk would often lead to ‘disgraceful

6. 66 Cal. App. 4th 244 (1998).

7. *Id.* at 247.

8. *Estate of Hite*, 155 Cal. 436, 441, 101 P. 443 (1909) (quoting *Smithsonian Inst. v. Meech*, 169 U.S. 398, 415 (1898)).

1 family exposures,’ as a result of which “the family skeleton will have been made
2 to dance.”⁹

3 An effective no contest clause can prevent that sort of public airing of private
4 matters.

5 **Avoiding Settlement Pressure**

6 A disappointed heir may attempt to extract a larger gift from the estate by
7 threatening to file a contest. So long as the amount demanded is less than the cost
8 to defend against the contest, there will be pressure to accede to the demand,
9 regardless of its merits.

10 A no contest clause can be used to avoid that result. The potential contestant’s
11 bargaining position is much reduced if filing a nuisance suit would forfeit the gift
12 made to that person under the estate plan.

13 **Use of Forced Election to Avoid Ownership Disputes**

14 In some cases, the proper disposition of a transferor’s property may be
15 complicated by difficult property characterization issues.

16 For example: a decedent is survived by his wife of many years. It was a second
17 marriage for both spouses, each of whom had significant separate property assets
18 of their own. Over the years of their marriage it became increasingly difficult to
19 characterize ownership of their assets as separate or community property: gifts
20 were made (or implied), accounts were mingled, community property
21 contributions were made to separate property business interests, etc. Rather than
22 put his heirs to the expense and delay that would be required for a thorough
23 property characterization, the transferor uses a no contest clause to sidestep the
24 issue.

25 The transferor claims that all of the disputed assets are his separate property,
26 gives a gift to his surviving wife that is clearly greater than the amount she would
27 recover if she were to contest the property characterization, and includes a no
28 contest clause. This forces the surviving spouse to make a choice between
29 acquiescing in the decedent’s estate plan and taking the amount offered under that
30 plan, or forfeiting that amount in order to pursue her independent rights under
31 community property law.

32 If the offer made in the estate plan is fair to the surviving spouse, she can save
33 the estate a considerable amount of money and time by waiving her community
34 property interest in the assets claimed by the decedent. Similar facts were at issue
35 in *George v. Burch*:¹⁰

9. Leavitt, *Scope and Effectiveness of No-Contest Clauses in Last Wills and Testaments*, 15 Hastings L.J. 45 (1963) (citations omitted).

10. 7 Cal. 4th 246, 265-66, 866 P.2d 92, 27 Cal. Rptr. 2d 165 (1994).

1 [Estate] planning for many married couples now entails allocating a lifetime of
2 community and separate assets between the current spouse and children from a
3 previous marriage. The difficulties inherent in ascertaining community interests in
4 otherwise separate property pose a significant challenge to the testator or testatrix.
5 If the testator or testatrix errs in identifying or calculating the community interests
6 in his or her property, costly and divisive litigation may ensue and testamentary
7 distributions in favor of one or more beneficiaries might unexpectedly be
8 extinguished. As both the Legislature and courts have long recognized, no contest
9 clauses serve an important public policy in these situations by reducing the threat
10 of litigation and uncertainty.

11 There are other situations, besides the disposition of marital property, that may
12 give rise to a forced election of the type described above. For example, business
13 partners may also have mingled assets in a way that would make proper division
14 difficult, or there may be a disputed debt owed by the decedent to an heir. In such
15 cases, a no contest clause and a sufficiently generous gift can resolve the matter
16 without litigation.

17 **Continuity of Law**

18 Consideration must be given to the fact that many estate plans have been drafted
19 in reliance on existing law. Any change in the law governing the enforcement of a
20 no contest clause could result in significant transitional costs, as transferors are
21 required to review their estate plans and make whatever changes make sense under
22 the new law. If a transferor dies before adjustments can be made, the estate plan
23 may operate in an unintended way.

24 **POLICIES FAVORING NON-ENFORCEMENT**

25 It is true that a person generally has the right to dispose of property on death as
26 that person sees fit. The law does not require that an estate plan be wise or fair.

27 However, it is also true that the public has important policy interests in the
28 proper execution and administration of estates, which justify significant
29 regulation.

30 The law regulates the creation, modification, and revocation of a donative
31 instrument, in order to ensure that the transferor has the necessary capacity to act
32 and is free from coercion, fraud, or undue influence. Creditor claim procedures
33 exist to protect third parties who have an independent interest in estate assets. The
34 law provides default rules, such as the rule providing a share for a pretermitted
35 heir, to implement the likely intentions of a person who has failed to express a
36 clear intention on an important matter. The law provides a standard of care and
37 rules for accountability to govern the conduct of a trustee or other fiduciary.

1 The courts have acknowledged that a no contest clause may be trumped by
2 important public policies.¹¹ Specific policy concerns are discussed below.

3 **Access to Justice**

4 As a general matter, a person should have access to the courts to remedy a
5 wrong. A no contest clause works against that policy, by threatening a significant
6 loss to an heir who exercises that right. In one of the earliest decisions holding that
7 a no contest clause is unenforceable (in Indiana, one of the two states that
8 currently prohibits enforcement), the court based its holding on the importance of
9 access to justice:

10 [It] is against the fundamental principles of justice and policy to inhibit a party
11 from ascertaining his rights by appeal to the tribunals established by the State to
12 settle and determine conflicting claims. If there be any such thing as public
13 policy, it must embrace the right of a citizen to have his claims determined by
14 law.¹²

15 **Forfeiture Disfavored**

16 Because forfeiture is such a harsh penalty, it is disfavored as a matter of policy.
17 Accordingly, a no contest clause should be applied conservatively, so as not to
18 extend the scope of application beyond what was intended: “Because a no contest
19 clause results in a forfeiture ... a court is required to strictly construe it and may
20 not extend it beyond what was plainly the testator’s intent.”¹³

21 **Judicial Action Required to Determine or Implement Transferor’s Intentions**

22 In order to effectuate a transferor’s intentions, it is necessary to ascertain those
23 intentions. In some situations, a judicial proceeding may be necessary to do so. In
24 those cases, a no contest clause could work against the effectuation of the
25 transferor’s intentions, by deterring action that is necessary to determine or
26 preserve those intentions. Areas of specific concern are discussed below.

27 **Capacity**

28 In order to execute a donative instrument, a transferor must have the requisite
29 mental capacity.¹⁴

11. Estate of Kitchen, 192 Cal. 384, 388-89, 220 P. 301 (1923) (no contest clause enforceable “so long as the condition was not prohibited by some law or opposed to public policy.”).

12. Mallet v. Smith, 6 Rich. Eq. 12, 20 (S.C. 1853).

13. *George v. Burch*, 7 Cal. 4th at 254. See also Prob. Code § 21304 (no contest clause to be strictly construed).

14. See Prob. Code §§ 811-812 (capacity to convey property and contract), 6100.5(a) (capacity to make will).

1 If a person lacks the legal capacity to execute a donative instrument, then the
2 instrument is not a reliable expression of the person's intentions and should not be
3 enforced.

4 A no contest clause that deters inquiry into the transferor's capacity may work
5 against effectuation of the transferor's intention, by preserving an invalid
6 instrument.

7 ***Authenticity***

8 The law establishes formalities for the creation, modification, and revocation of
9 a donative instrument.¹⁵

10 Those formalities help to guarantee the authenticity of an instrument as a
11 genuine expression of the transferor's intentions. For example, the rules for
12 witnessing the execution of a will help to verify the capacity of the executor and to
13 avoid a forgery.

14 The policy of effectuating a transferor's intentions depends on the instrument
15 being an actual expression of the transferor's intentions. A no contest clause can
16 deter efforts to prove that an instrument is actually a forgery or is otherwise
17 invalid.

18 ***Duress, Menace, Fraud, and Undue Influence***

19 A donative instrument that is executed as a result of duress, menace, fraud, or
20 undue influence does not reflect the transferor's freely given consent. It should not
21 be enforced.¹⁶

22 A no contest clause can deter judicial inquiry into whether a person who
23 executed a donative instrument acted freely. That can shield abuse from effective
24 review. A clever wrongdoer may intentionally take advantage of that fact.

25 ***Ambiguity***

26 If a provision of a donative instrument is ambiguous, it may be difficult to
27 determine the transferor's intentions. Different heirs may argue for different
28 meanings. Judicial construction of the instrument may be necessary to resolve the
29 matter.¹⁷

30 To the extent that a no contest clause would deter the heirs from seeking judicial
31 construction of an ambiguous provision, it works against the policy of effectuating
32 the transferor's intentions.

15. See, e.g., Prob. Code §§ 6110-6113 (execution of will); 6120-6124 (revocation and revival of will); 15200-15201, 15206 (creation of trust); 15401-15402 (revocation of trust by settlor).

16. See Section 6104 (will procured by duress, menace, fraud, or undue influence is ineffective); Civ. Code §§ 1565-1575 (contract procured by duress, menace, fraud, or undue influence is voidable).

17. See 64 Cal. Jur. 3d *Wills* § 355 (2006) (construction of will); Prob. Code § 17200(b)(1) (construction of trust).

1 **Reformation of Instrument**

2 There may be instances where the meaning of a donative instrument is clear, but
3 there is an unanticipated change in circumstances that would make the instrument
4 ineffective to implement the transferor’s purpose. In such a case, it may be
5 appropriate to seek judicial modification of the instrument.

6 For example, a court may modify or terminate a trust, on the petition of a trustee
7 or a beneficiary, “if, owing to circumstances not known to the settlor and not
8 anticipated by the settlor, the continuation of the trust under its terms would defeat
9 or substantially impair the accomplishment of the purposes of the trust.”¹⁸

10 In such a case, a no contest clause could deter heirs from seeking a judicial
11 modification of an instrument that is necessary in order to effectuate the
12 transferor’s actual intentions.

13 **Judicial Supervision of Fiduciary**

14 Important public policies are served by judicial supervision of an executor,
15 trustee, or other fiduciary, and such supervision should not be impeded by the
16 operation of a no contest clause: “No contest clauses that purport to insulate
17 executors completely from vigilant beneficiaries violate the public policy behind
18 court supervision.”¹⁹

19 **Misuse of Forced Election**

20 As discussed above in “Use of Forced Election to Avoid Property Ownership
21 Disputes,” a no contest clause may be used to force an heir to either take whatever
22 is offered under the transferor’s estate plan or forfeit that gift in order to assert an
23 independent interest in the estate assets (e.g., by filing a creditor’s claim or
24 disputing ownership or dispositive control of marital property).

25 Such a forced election may be entirely fair, where the amount offered to the heir
26 is sufficiently large to justify acquiescence in the estate plan. Costly litigation will
27 be avoided and the details of the transferor’s estate plan can be implemented as
28 intended.

29 However, there are reasons for concern about the use of a no contest clause to
30 force an election:

- 31 (1) *The heir may settle for less than what is due.* Suppose that a surviving
32 spouse has good reason to believe that the transferor’s estate plan would
33 transfer \$100,000 of property that is actually owned by the surviving spouse.
34 If it would cost \$30,000 to adjudicate the matter, the surviving spouse might
35 rationally accept a gift of \$80,000 rather than forfeit that amount in order to
36 recover a net amount of \$70,000. If the inconvenience, risk, and delay of
37 litigation are significant detriments, the surviving spouse might accept even
38 less.

18. Prob. Code § 15409.

19. Estate of Ferber, 66 Cal. App. 4th 244, 253-54, 77 Cal. Rptr. 2d 774 (1998).

1 (2) *The estate plan may be inconsistent with the heir's own dispositional*
2 *preferences.* For example, a surviving spouse would have liked her share of
3 a vacation home to pass to her children from a former marriage. Under
4 community property law, she should be free to make that disposition of her
5 own interest in the property. Instead, the transferor's estate plan transfers the
6 entire home to his children from a former marriage. A no contest clause may
7 coerce the surviving spouse into accepting that result, even though it is
8 contrary to her own preferences as to the disposition of property that is by
9 law under her control.

10 (3) *Unilateral disposition of community property violates public policy.*
11 California law provides that one spouse may not make a gift of community
12 property without the written consent of the other spouse,²⁰ but a forced
13 election may have just that effect. The surviving spouse has not given
14 advance written consent. Any acquiescence in the result may well be the
15 result of coercion. That may be especially true for an elderly surviving
16 spouse.

17 These problems result from the "take it or leave it" nature of a forced election.
18 The transferor is given unilateral control to frame the choice, without an
19 opportunity for negotiation. The choice may be framed benevolently, so as to
20 benefit everyone concerned, or it may be framed cynically or carelessly, offering a
21 choice between two undesirable results.²¹

22 The benefits of a forced election could often be achieved through advance
23 consultation and joint estate planning. If spouses cannot agree during life on the
24 characterization or disposition of estate property, allowing one spouse to make
25 unilateral decisions on death would be especially problematic.

26 DIFFERING APPROACHES TO ENFORCEMENT
27 OF NO CONTEST CLAUSES

28 In all but two states, a no contest clause is enforced.²² However, enforcement
29 may be subject to a number of restrictions:

- 30 • In most states, a no contest clause will not be enforced if there is probable
31 cause to bring the contest.
- 32 • In a few states (including California), a probable cause exception applies to
33 specified types of contests.
- 34 • In general, a no contest clause will not be enforced if enforcement would
35 conflict with an important public policy. This has led to a number of specific
36 public policy exceptions to enforcement. Some derive from court holdings,

20. Fam. Code §§ 1100-1102.

21. See also *George v. Burch*, 7 Cal. 4th 246, 283-87, 866 P.2d 92, 27 Cal. Rptr. 2d 165 (1994) (Kennard, J., dissenting) (arguing against use of no contest clause to create marital forced election).

22. The exceptions are Florida and Indiana. See Fla. Stat. Ann. § 732.517; Ind. Code § 29-1-6-2.

1 while others have been enacted by statute. California law includes several
2 express public policy exceptions.

- 3 • Many states provide special rules of construction that limit or clarify the
4 application of a no contest clause.

5 Those restrictions are discussed more fully below.

6 **General Probable Cause Exception**

7 Twenty-eight states will not enforce a no contest clause if there is probable
8 cause to bring the contest. That is the approach taken in the Uniform Probate
9 Code,²³ which has been adopted in 17 states.²⁴ Another 11 states have adopted a
10 probable cause exception that is not derived from the Uniform Probate Code. In
11 some of those states, good faith is also expressly required.²⁵

12 The Restatement (Third) of Property states that probable cause exists if, at the
13 time of instituting a proceeding, there is evidence that “would lead a reasonable
14 person, properly informed and advised, to conclude that there was a substantial
15 likelihood that the challenge would be successful.”²⁶

16 **Selective Probable Cause Exception**

17 In New York and Oregon, a no contest clause is not enforced against a contest
18 that is based on a claim of forgery or revocation, if the contest is brought with
19 probable cause.²⁷

20 In California, a no contest clause is not enforced against a contest that is based
21 on forgery, revocation, or specified types of close relationships between a

23. See Unif. Prob. Code §§ 2-517, 3-905 (1990).

24. See Alaska Stat. §§ 13.12.517, 13.16.555 (Alaska), A.R.S. § 14-2517 (Arizona), Colo. Rev. Stat § 15-12-905 (Colorado), Haw. Rev. Stat. § 560:3-905 (Hawaii), Idaho Code § 15-3-905 (Idaho), Me. Rev. Stat. Ann. tit. 18-A, § 3-905 (Maine), Mich. Comp. Las Ann. § 700.2518 (Michigan), Minn. Stat. Ann. § 524.2-517 (Minnesota), Mont. Code Ann. § 72-2-537 (Montana), Neb. Rev. Stat. § 30-24.103 (Nebraska), N.J. Stat. Ann. § 3B:3-47 (New Jersey), N.M. Stat. Ann. § 45-2-517 (New Mexico), N.D. Cent. Code § 30.1-20-05 (North Dakota), 20 Pa.C.S.A. § 2521 (Pennsylvania), S.C. Code Ann. § 62-3-905 (South Carolina), S.D. Codified Laws § 29A-3-905 (South Dakota), Utah Code Ann. § 75-3-905 (Utah).

25. See South Norwalk Trust Co. v. St. John, 101 A. 961, 963 (Conn. 1917) (good faith also required) (Connecticut); In re Cocklin’s Estate, 17 N.W.2d 129, 136 (Iowa 1945) (good faith also required) (Iowa); In re Foster’s Estate, 190 Kan. 498, 500 (1963) (good faith also required) (Kansas); Md. Estates and Trusts Code Ann. § 4-413 (Maryland); Hannam v. Brown, 114 Nev. 350, 357 (1998) (Nevada); Ryan v. Wachovia Bank & Trust Co., 70 S.E.2d 853, 856 (N.C. 1952) (North Carolina); Tate v. Camp, 245 S.W. 839, 844 (Tenn. 1922) (Tennessee); Hodge v. Ellis, 268 S.W.2d 275 (Tex. Ct. App. 1954) (Texas); In re Estate of Chappell, 127 Wash. 638, 646 (1923) (Washington); Dutterer v. Logan, 103 W. Va. 216, 221 (1927) (West Virginia); In re Keenan’s Will, 188 Wis. 163, 179 (1925) (Wisconsin).

26. Restatement (Third) of Property: Wills & Donative Transfers § 8.5 (2003).

27. New York Est. Powers & Trusts § 3-3.5(b)(1) (McKinney 2006); O.R.S. § 112.272(2).

1 transferor and beneficiary, if the contest is brought with reasonable or probable
2 cause.²⁸

3 **Specific Public Policy Exceptions**

4 California and other states have established a number of specific public policy
5 exceptions to the enforcement of a no contest clause. Those exceptions are
6 discussed below.

7 ***Construction and Reformation of Instrument***

8 To effectuate the transferor's actual intentions it may be necessary to seek
9 judicial construction of an ambiguous provision or the modification, reformation,
10 or termination of an instrument that has become incompatible with the transferor's
11 intentions. The need to determine the transferor's actual intentions may trump the
12 transferor's desire to avoid litigation.

13 [It] is the privilege and right of a party beneficiary to an estate at all times to
14 seek a construction of the provisions of the will. An action brought to construe a
15 will is not a contest within the meaning of the usual forfeiture clause, because it is
16 obvious that the moving party does not by such means seek to set aside or annul
17 the will, bur rather to ascertain the true meaning of the testatrix and to enforce
18 what she desired.²⁹

19 In California, a pleading regarding the interpretation of an instrument containing
20 a no contest clause (or referenced in a no contest clause) is exempt from the
21 application of a no contest clause.³⁰ A similar exception exists in Arkansas, Iowa,
22 and New York.³¹

23 In California, a pleading seeking relief under the law governing the reformation
24 of an instrument is exempt from the application of a no contest clause.³² This
25 allows the court to make adjustments to an instrument to preserve the settlor's
26 intentions, despite a mistake or an unforeseen change in circumstances.

28. Prob. Code §§ 21306-21307. Sections 21306 and 21307 overlap in application, but state nominally different standards for the exception. Section 21306 provides an exception for "reasonable cause," as defined. Section 21307 provides an exception for "probable cause." A court construing Section 21306 held that the terms were synonymous. See *In re Estate of Gonzalez*, 102 Cal. App. 4th 1296, 126 Cal. Rptr. 2d 332 (2002).

29. *Estate of Miller*, 230 Cal. App. 2d 888, 903, 41 Cal. Rptr. 410 (1964).

30. Prob. Code § 21305(b)(9).

31. *Ellsworth v. Arkansas Nat'l Bank*, 109 S.W.2d 1258, 1262 (Ark. 1937); *Geisinger v. Geisinger*, 41 N.W.2d 86, 93 (Iowa 1950); *New York Est. Powers & Trusts § 3-3.5(b)(3)(E)* (McKinney 2006).

32. Prob. Code § 21305(b)(1), (11).

1 ***Fiduciary Supervision***

2 Public policy imposes a high standard of care on a fiduciary. Report
3 requirements and procedures for challenging a fiduciary's conduct provide an
4 important measure of accountability and supervision.

5 To preserve the court's role in supervising the conduct of a fiduciary, California
6 exempts the following pleadings relating to the supervision of a fiduciary from the
7 application of a no contest clause:

- 8 • A pleading challenging the exercise of a fiduciary power.³³
- 9 • A pleading regarding the appointment or removal of a fiduciary.³⁴
- 10 • A pleading regarding an accounting or report of a fiduciary, including a
11 petition to compel an accounting or report.³⁵
- 12 • A petition to determine whether a trust waives the trustee's obligation to
13 make an accounting or other report to a beneficiary.³⁶
- 14 • A pleading under the conservatorship law.³⁷ There is also a specific
15 exception for a pleading in an action under Probate Code Section 2403
16 (providing for court authorization or approval of conservator action with
17 respect to estate).³⁸
- 18 • A pleading under the Power of Attorney Law.³⁹
- 19 • A pleading regarding court approval of a settlement or compromise.⁴⁰

20 ***Action on Behalf of Minor or Incompetent***

21 In New York and Oregon, an action on behalf of a minor or incompetent to
22 oppose the probate of a will is exempt from the application of a no contest
23 clause.⁴¹ Presumably, the concern is that a minor or incompetent should not suffer
24 a forfeiture as a result of a decision that is made by another. The guardian may
25 exercise poor judgment, resulting in a significant loss that cannot be recovered.

26 ***Forfeiture for Action of Another***

27 In Louisiana, one court held that a no contest clause was unenforceable because
28 it would cause all heirs to forfeit if any of the heirs were to contest the will.⁴²

33. Prob. Code § 21305(b)(6).

34. Prob. Code § 21305(b)(7).

35. Prob. Code § 21305(b)(8), (12).

36. Prob. Code § 21305(b)(12).

37. Prob. Code § 21305(b)(2).

38. Prob. Code § 21305(b)(5).

39. Prob. Code § 21305(b)(3).

40. Prob. Code § 21305(b)(10).

41. New York Est. Powers & Trusts § 3-3.5(b)(2) (McKinney 2006); O.R.S. § 112.272(3).

42. Succession of Kern, 252 So.2d 507 (La. App., 1971).

1 However, other jurisdictions, including California,⁴³ allow a no contest clause to
2 condition a forfeiture of an heir's interest on the actions of another person. "[A]
3 transferor may provide for the rescission of a gift to a grandchild in the event that
4 the disinherited parent of the grandchild institutes proceedings either to contest the
5 donative document or to challenge any of its provisions."⁴⁴ In effect, this allows a
6 transferor to disinherit a person entirely and still deter that person from contesting
7 the estate plan — by threatening the forfeiture of a gift to the disinherited person's
8 loved ones.

9 *Other Miscellaneous Exceptions*

10 There are a few miscellaneous types of actions that have been exempted from
11 the application of a no contest clause:

- 12 • In California, a pleading regarding annulment of marriage.⁴⁵
- 13 • In Georgia, a no contest clause in a will that does not provide an alternative
14 disposition of the assets that would be forfeited under the clause.⁴⁶
- 15 • In New York, an objection to the jurisdiction of the court in which a will is
16 offered for probate.⁴⁷
- 17 • In New York, an heir's disclosure, to a court or otherwise, of information
18 that is relevant to a probate proceeding.⁴⁸
- 19 • In New York, a failure to join in, consent to, or waive notice of a probate
20 proceeding.⁴⁹
- 21 • In New York, the preliminary examination of a witness, the person who
22 prepared the will, the nominated executor, or the proponent of the will.⁵⁰

43. Tunstall v. Wells, 144 Cal. App. 4th 554, 50 Cal. Rptr. 3d 468 (2006).

44. Restatement (Third) of Property: Wills & Donative Transfers § 8.5, Comment (2003).

45. Prob. Code § 21305(b)(4). A bigamous or incestuous marriage is void as a matter of law. Fam. Code §§ 2200-2201. A marriage is voidable if it is procured through fraud or coercion, or if one of the spouses lacks the capacity to marry (based on age or mental state). Fam. Code § 2210. A transferor should not be permitted to coerce heirs into accepting a marriage that is void or voidable.

46. O.C.G.A. § 53-4-68(b).

47. New York Est. Powers & Trusts § 3-3.5(b)(3)(A) (McKinney 2006).

48. New York Est. Powers & Trusts § 3-3.5(b)(3)(B) (McKinney 2006).

49. New York Est. Powers & Trusts § 3-3.5(b)(3)(C) (McKinney 2006).

50. New York Est. Powers & Trusts § 3-3.5(b)(3)(D) (McKinney 2006).

Special Rules of Construction

1 ***Strict Construction***

2 In many states, including California, a no contest clause is to be strictly
3 construed.⁵¹ “Strict construction is consistent with the public policy to avoid a
4 forfeiture.”⁵²

5 ***Presumption Against Application***

6 In California, Probate Code Section 21305(a) provides a list of pleadings that
7 “do not constitute a contest unless expressly identified in the no contest clause as a
8 violation of the clause:”

- 9 (1) The filing of a creditor’s claim or prosecution of an action based upon it.
- 10 (2) An action or proceeding to determine the character, title, or ownership of
11 property.
- 12 (3) A challenge to the validity of an instrument, contract, agreement,
13 beneficiary designation, or other document, other than the instrument containing
14 the no contest clause.

15 A generally phrased forfeiture clause would not apply to the listed pleadings.

16 ***Declaratory Relief***

17 In California, a beneficiary may apply to the court for a determination of
18 whether a particular pleading would trigger a no contest clause in an instrument
19 that is or has become irrevocable.⁵³ A petition for declaratory relief brought under
20 Section 21320(a) is itself exempt from the application of a no contest clause. This
21 creates a safe harbor, from which a potential contestant can determine, without
22 risk, whether a contemplated contest would trigger a forfeiture.

23 A court may not make a determination under Section 21320 if to do so it would
24 be required to make a determination of the merits of the underlying dispute.⁵⁴

25 **SUMMARY OF CALIFORNIA STATUTE**

26 The California statutory approach to the enforcement of a no contest clause can
27 be summarized as follows:
28

51. See Prob. Code § 21304. See also *Kershaw v. Kershaw*, 848 So. 2d 942, 954-55 (Ala. 2002) (Alabama); *Estate of Pepler*, 971 P.2d 694, 696 (Colo. App. 1998) (Colorado) ; *Estate of Wojtalewicz*, 418 N.E. 2d 418 (Ill. 1st Dist. 1981) (Illinois); *Saier v. Saier*, 366 Mich. 515 (1962) (Michigan); *Matter of Alexander*, 90 Misc. 2d 482, 486 (N.Y. 1977) (New York); *Estate of Westfahl*, 675 P.2d 21 (Okla. 1983) (Oklahoma); *Estate of Hodges*, 725 S.W.2d 265, 268 (Tex. Ct. App. 1986) (Texas).

52. Prob. Code § 21304 Comment.

53. See Prob. Code § 21320(a).

54. See Prob. Code § 21320(c).

- 1 • A no contest clause is generally enforceable.⁵⁵
- 2 • A no contest clause is to be strictly construed.⁵⁶
- 3 • A number of specified pleadings are exempt from a no contest clause for
- 4 reasons of public policy.⁵⁷
- 5 • Certain pleadings do not violate a no contest clause unless specifically
- 6 identified in the no contest clause as a violation.⁵⁸
- 7 • A probable cause exception exists for certain specified pleadings.⁵⁹
- 8 • A declaratory relief procedure is available to determine whether a pleading
- 9 would violate a no contest clause.⁶⁰

10 PROBLEMS UNDER EXISTING LAW

11 Recent articles published in the *California Trusts and Estates Quarterly* express
12 practitioner dissatisfaction with the existing no contest clause statute.⁶¹ The
13 articles identify the following problems:

- 14 • Uncertainty as to the application of a no contest clause.
- 15 • Excessive use of the declaratory relief procedure.
- 16 • Use of a no contest clause to shield elder financial abuse from review.

17 In February 2006, the Commission conducted a survey of the members of the
18 Trusts and Estate Section of the State Bar of California and the members of the
19 California chapters of the National Academy of Elder Law Attorneys.⁶² The
20 survey was designed to answer two questions: (1) Do practitioners believe that
21 there are problems with existing law that are serious enough to justify a significant
22 change in the law? (2) Which of the identified problems is most serious?

55. Prob. Code § 21303.

56. Prob. Code § 21304.

57. Prob. Code § 21305(b) (interpretation of instrument, reformation of instrument, modification of trust, supervision of fiduciary, action involving conservator, action involving power of attorney, annulment of marriage, approval of settlement).

58. Prob. Code § 21305(a) (creditor claim, property characterization, instrument other than instrument containing clause).

59. Prob. Code §§ 21306-21307 (forgery, revocation, disqualified beneficiary).

60. Prob. Code § 21320.

61. See Hartog et al., *Why Repealing the No Contest Clause is a Good Idea*, Cal. Tr. & Est. Q., Fall 2004; Baer, *A Practitioner's View*, Cal. Tr. & Est. Q., Fall 2004; Horton, *A Legislative Proposal to Abolish Enforcing No Contest Clauses in California*, Cal. Tr. & Est. Q., Fall 2004. But see MacDonald & Godshall, *California's No Contest Statute Should be Reformed Rather Than Repealed*, Cal. Tr. & Est. Q., Fall 2004.

62. For full survey results, see Commission Staff Memorandum 2007-7 (Feb. 21, 2007) (available at www.clrc.ca.gov). The Commission received 351 responses to the survey. *Id.* at 4-5.

1 Most survey respondents agreed that problems with existing law are serious
2 enough to justify a significant change in the law.⁶³

3 The problems identified by practitioners are discussed more fully below.

4 **Uncertain Application**

5 The most common and serious problem reported by practitioners is uncertainty
6 as to whether a particular no contest clause would apply to an intended contest.⁶⁴

7 That uncertainty has three main sources: (1) the open-ended definition of
8 “contest,” (2) the complexity of existing law, and (3) the perceived failure of
9 courts to construe no contest clauses strictly.

10 ***Definition of “Contest”***

11 Under existing law, the concept of what constitutes a “contest” is open-ended. It
12 can include any pleading in any proceeding in any court that “challenges the
13 validity of an instrument or one or more of its terms.”⁶⁵ This means that any court
14 pleading that affects estate assets or interferes with the operation of an instrument
15 could potentially be governed by a no contest clause.⁶⁶

16 The limiting factor is the no contest clause itself. It defines what pleadings will
17 trigger forfeiture under the clause.⁶⁷ If a clause is stated broadly or imprecisely, its
18 scope of application may be uncertain. Each case will require the interpretation of
19 unique language as applied to unique facts.

20 The Legislature has narrowed the scope of that problem by exempting certain
21 pleadings from the operation of a no contest clause. Several types of pleadings are
22 completely exempt.⁶⁸ Other types of pleadings are disfavored; for a no contest
23 clause to apply to such a pleading it must expressly state its application to that
24 type of pleading.⁶⁹

63. Of those who expressed an opinion, 63% agreed or strongly agreed that there is a need for significant reform. Support for reform was strongest among those who self-identified as elder law practitioners. Eighty percent of elder law practitioners who expressed an opinion see a need for reform. *Id.* at 5.

64. Of those who expressed an opinion, 63% reported the problem of uncertainty to be common or very common and 65% found the problem to be of moderate or serious severity.

65. Prob. Code § 21300(a)-(c).

66. See, e.g., *Hermanson v. Hermanson*, 108 Cal. App. 4th 441, 133 Cal. Rptr. 2d 486 (2003) (petition to remove trustee); *In re Estate of Goulet*, 10 Cal. 4th 1074, 898 P.2d 425, 43 Cal. Rptr. 2d 111 (1995) (action to enforce premarital agreement); *Burch v. George*, 7 Cal. 4th 246, 27 Cal. Rptr. 2d 165, 866 P.2d 92 (1994) (action to determine whether purported estate asset is community property).

67. Prob. Code § 21300(a) (“‘Contest’ means any action identified in a ‘no contest clause’ as a violation of the clause.”).

68. Prob. Code § 21305(b).

69. Prob. Code § 21305(a). The disfavored contests are the assertion of a creditor claim, a property ownership dispute, and the contest of an instrument other than the instrument that contains the no contest clause.

1 However, any attempt to list all pleadings that should be exempt as a matter of
2 policy will necessarily be incomplete. Over time, new circumstances will arise that
3 had not previously been considered. For example, as originally enacted in 2000,
4 Probate Code Section 21305 exempted eight types of pleadings from the
5 enforcement of a no contest clause.⁷⁰ The section was amended two years later to
6 add another four exemptions.⁷¹ It seems inevitable that new fact situations will
7 continue to arise in the future, prompting the creation of further statutory
8 exemptions.

9 *Complexity of Existing Law*

10 The existing statute includes a complex set of limitations on the operation of a
11 no contest clause:

- 12 • A no contest clause does not apply to one class of pleadings, if the pleading
13 is brought with “reasonable” cause.⁷²
- 14 • Another class of pleadings, which appears to partially overlap the first, is
15 subject to a “probable” cause exception.⁷³
- 16 • Three types of pleadings are exempt from a no contest clause unless the
17 clause expressly provides otherwise.⁷⁴
- 18 • Twelve types of pleadings are categorically exempt from the application of a
19 no contest clause.⁷⁵
- 20 • Of the twelve exempt classes of pleadings, three are subject to an exception.
21 They are not exempt if the pleading is found to be a “direct contest.”⁷⁶
- 22 • There are four different application date provisions, which apply to different
23 types of instruments and pleadings.⁷⁷ The application provisions are not
24 consistent in their approach⁷⁸ and are difficult to understand.⁷⁹

25 The complexity of the existing statute invites error and misunderstanding. It
26 contributes to uncertainty as to whether a particular pleading could be governed by
27 a no contest clause or is exempt as a matter of law.

70. See 2000 Cal. Stat. ch. 17.

71. See 2002 Cal. Stat. ch. 150.

72. Prob. Code § 21306.

73. Prob. Code § 23107.

74. Prob. Code § 21305(a).

75. Prob. Code § 21305(b).

76. Prob. Code § 21305(e). See also Prob. Code § 21300(b) (“direct contest” defined).

77. Prob. Code § 21305(a), (c), (d).

78. Probate Code Section 21305(a) provides for application based on the date of execution of the instrument, but subdivision (d) bases application on the date of death of the transferor or the date on which an instrument becomes irrevocable.

79. See especially Prob. Code § 21305(c).

1 **Strict Construction**

2 Probate Code Section 21304 requires that a no contest clause be strictly
3 construed. The Commission recommended that rule in order to provide greater
4 certainty as to the application of a no contest clause:

5 A major concern with the application of existing California law is that a
6 beneficiary cannot predict with any consistency when an activity will be held to
7 fall within the proscription of a particular no contest clause. To increase
8 predictability, the proposed law recognizes that a no contest clause is to be strictly
9 construed in determining the donor's intent. This is consistent with the public
10 policy to avoid a forfeiture absent the donor's clear intent.⁸⁰

11 Some practitioners believe that the courts have strayed from the rule of strict
12 construction, by considering extrinsic evidence in construing the application of a
13 no contest clause.⁸¹ If extrinsic evidence is considered in construing a no contest
14 clause, then an heir cannot simply read the instrument to determine the meaning of
15 the no contest clause.

16 **Excessive Litigation**

17 The uncertainty that exists under current law can often be resolved by
18 declaratory relief pursuant to Probate Code Section 21320. That provision
19 authorizes an heir to seek judicial interpretation of a no contest clause to determine
20 whether it would apply to a particular pleading. If the court finds that it does not
21 apply, the heir may proceed with the pleading without risk of forfeiture. The
22 declaratory relief provides a safe harbor.

23 That protection against forfeiture (and attorney malpractice) has led to
24 widespread use of the declaratory relief procedure:

25 Prudent practitioners now routinely file petitions for declaratory relief under
26 Probate Code § 21320. Californians now expect to have two levels of litigation
27 when instruments contain a no contest clause: file a Probate Code § 21320
28 petition and litigate the declaratory relief, and then litigate the substantive issues
29 in another, separate proceeding.⁸²

30 In fact, there may be a need for more than one declaratory relief proceeding in
31 connection with a contest. If, in the course of litigation a contestant discovers new
32 facts that could affect the nature of the contest, a "prudent practitioner will advise
33 her client to file a new petition for declaratory relief. ... Indeed, in any complex
34 proceeding with discovery producing evidence of new potential claims, a second
35 or third filing pursuant to Probate Code § 21320 is likely."⁸³

80. *No Contest Clauses*, 20 Cal. L. Revision Comm'n Reports 7, 12 (1990).

81. Hartog et al., *Why Repealing the No Contest Clause is a Good Idea*, Cal. Tr. & Est. Q., Fall 2004, at 10.

82. *Id.*

83. *Id.*

1 That additional source of litigation adds costs to estates, heirs, and the courts.
2 The Executive Committee of the Trusts and Estates Section has estimated the
3 typical cost to a petitioner to obtain declaratory relief as follows:⁸⁴

- 4 • In 20% of cases, \$1,500-5,000.
- 5 • In 40% of cases, \$5,000-20,000.
- 6 • In 30% of cases, \$20,000 to 50,000.
- 7 • In 10% of cases, \$50,000 to 100,000.

8 The State Bar also surveyed several Superior Courts as to the average number of
9 declaratory relief petitions filed in a year:⁸⁵

10 Alameda County Superior Court:	50 per year
11 Los Angeles County Superior Court:	212 per year
12 Orange County Superior Court:	100-150 per year
13 San Diego County Superior Court:	12-19 per year
14 San Francisco County Superior Court:	25 per year

15 If the average cost to a petitioner for declaratory relief is \$10,000, use of the
16 declaratory relief procedure in those counties would appear to be costing
17 petitioners over four million dollars in legal costs and fees annually. There would
18 also be costs to those opposing the petitions and to the courts.

19 Respondents to the Commission's survey ranked the cost and delay associated
20 with declaratory relief proceedings as the second most common and serious of the
21 problems identified in the survey.⁸⁶

22 **Fraud and Undue Influence Shielded From Review**

23 An unscrupulous person may use a no contest clause to deter inquiry into
24 whether a gift in an estate planning instrument was procured through duress,
25 menace, fraud, or undue influence. "Experienced practitioners are well aware that
26 the no contest clause is a favorite device of undue influencers and those who use
27 duress to become the (unnatural) object of a decedent's bounty."⁸⁷

28 In general, the only way to contest a suspect instrument without forfeiture is to
29 successfully invalidate the instrument. Even in a case where there is strong reason
30 to suspect foul play, an heir may still fall short of certainty that a contest would be
31 successful. In such a case, the abuse may stand unchallenged.

84. See Commission Staff Memorandum 2006-42 (Oct. 10, 2006), Exhibit p. 7 (available at www.clrc.ca.gov).

85. See *id.* at Exhibit pp. 9-10.

86. Of those who expressed an opinion, 61% reported the problem of the cost and delay associated with declaratory relief is common or very common and 63% found the problem to be of moderate or serious severity.

87. See Hartog et al., *Why Repealing the No Contest Clause is a Good Idea*, Cal. Tr. & Est. Q., Fall 2004, at 11.

1 Most Commission survey respondents indicate that the use of a no contest clause
2 to shield elder financial abuse is a serious problem, but not a common one.⁸⁸

3 FEE SHIFTING ALTERNATIVE

4 The Trusts and Estates Section of the State Bar has proposed that all no contest
5 clauses be made unenforceable. The deterrence of contest litigation would instead
6 be achieved through an award of costs and fees against a person who brings an
7 unsuccessful direct contest without reasonable cause.⁸⁹

8 The Commission does not recommend that approach, for two reasons:

9 **Transferor Intention Disregarded**

10 The rationale for enforcement of a no contest clause is based primarily on
11 deference to a transferor's intentions and the transferor's fundamental right to
12 place any lawful condition on a gift of the transferor's property.

13 A statutory rule providing for an award of costs and fees against any
14 unsuccessful contestant who lacks reasonable cause to bring a contest cannot be
15 justified by reference to a transferor's intentions.

16 The proposal would constitute a deviation from the default rule in California,
17 that each party bears its own costs.⁹⁰ It is not clear why estate contests, as a class,
18 should be treated differently from other types of litigation.

19 **Deterrence Undermined**

20 The purpose of a no contest clause is to deter contest litigation. Many of the
21 harms that can result from litigation occur early in a contest (e.g., reputational
22 harm to the transferor or heirs, acrimony between heirs, and pressure to settle with
23 a dissatisfied heir).

24 To deter those harms, forfeiture of a gift under a no contest clause is triggered
25 by the mere filing of a pleading.⁹¹ This creates a clear choice for a contestant. The
26 only way to avoid forfeiture is to take no court action at all.

27 The proposed fee shifting alternative would not present that sort of all-or-
28 nothing choice. Because the penalty for bringing an unreasonable contest is the
29 payment of defense costs and fees, the magnitude of the penalty would be
30 proportional to the duration of the litigation. A contestant who simply files a

88. Of those who expressed an opinion, 55% reported that the use of a no contest clause to deter review of fraud or undue influence is of moderate or serious severity, but only 42% found the problem to be common or very common. Concern is greater among self-identified elder law practitioners: 67% of those who expressed an opinion found the problem to be of moderate or serious severity; 62% found it to be common or very common. That probably reflects the nature of the cases handled by these specialists.

89. See Horton, *A Legislative Proposal to Abolish Enforcing No Contest Clauses in California*, Cal. Tr. & Est. Q., Fall 2004, at 7-8.

90. See Code Civ. Proc. § 1021.

91. See Prob. Code §§ 21300, 21303.

1 pleading would bear little cost for doing so. A contestant who is willing to bear
2 larger costs could go on to conduct discovery, in the hopes of finding evidentiary
3 support for the contest. That sort of incremental exploratory litigation could cause
4 many of the harms that a no contest clause seeks to avoid. It would also strengthen
5 the bargaining position of a disappointed heir who wants to negotiate a settlement
6 that makes a larger gift to the heir.

7 RECOMMENDATION

8 Long-standing precedent in California recognizes that a no contest clause does
9 not inherently violate public policy and should generally be enforced. A transferor
10 has a right to place any condition on a gift, so long as the condition does not
11 violate public policy. It is reasonable for a transferor to seek to avoid a contest and
12 the cost, delay, acrimony, embarrassment, and settlement pressure that can result.

13 The Commission recommends that the problems arising under the existing no
14 contest clause statute be remedied through simplification of the law and the
15 extension of existing limitations on enforcement.

16 **Statutory Simplification**

17 The uncertainty that arises under existing law is largely a result of the open-
18 ended definition of “contest,” combined with a complex and lengthy set of
19 exemptions. Because any pleading relating to an estate could be governed by a no
20 contest clause, every such pleading must be examined to determine whether it
21 would, in fact, trigger a no contest clause. That analysis requires careful
22 interpretation of the language used in the no contest clause and the interpretation
23 and application of the statutory exemption scheme.

24 A much simpler approach would be to expressly limit the types of contests that
25 may be governed by a no contest clause. Under that approach, any pleading that is
26 not one of the expressly covered types would not be governed by a no contest
27 clause. No further analysis would be required. That would eliminate both the
28 open-ended definition of “contest” as well as the lengthy (and inevitably
29 incomplete) list of statutory exemptions.

30 That is the approach taken in the proposed law.⁹² A no contest clause could only
31 be enforced in response to a “direct contest.” Conceptually, a direct contest is an
32 attempt to invalidate an instrument on the grounds that the instrument does not
33 express the transferor’s genuine, knowing, and freely formed intentions. That is
34 the traditional conception of a will contest.⁹³

92. See proposed Prob. Code § 21333 *infra*.

93. See former Probate Code Section 371, which described a will contest as follows:

Any issue of fact involving the competency of the decedent at the time of the execution of the will from duress, menace, fraud, or undue influence, the due execution and attestation of the will, or any other question substantially affecting the validity of the will....

1 Specifically, a direct contest would be a contest that is based on one or more of
2 the following grounds: (1) forgery, (2) lack of due execution, (3) lack of capacity,
3 (4) menace, duress, fraud, or undue influence, (5) disqualification of a beneficiary
4 under Section 21350, or (6) revocation of the instrument.⁹⁴ No other pleadings
5 would result in enforcement of a no contest clause.

6 The proposed change would provide greater certainty as to the application of a
7 no contest clause and would eliminate most of the existing statutory complexity.

8 The substantive effect of the proposed change would be relatively modest.
9 Existing law already exempts nearly all types of “indirect contests” from the
10 operation of a no contest clause. The proposed law would merely extend that
11 trend, exempting all indirect contests from the operation of a no contest clause.

12 **Forced Election Precluded**

13 The most significant effect of the proposed revision would be to preclude the
14 application of a no contest clause to a creditor claim or property ownership
15 dispute. Under existing law, a no contest clause can be applied to those pleadings,
16 but only if the clause itself expressly states such application.

17 By precluding the application of a no contest clause to a property
18 characterization dispute, the proposed law would effectively prevent the use of a
19 no contest clause to create a “marital forced election,” in which a surviving spouse
20 is forced to choose between asserting ownership of purported estate assets or
21 accepting the gift offered under the estate planning instrument.

22 In some cases, a forced marital election can be an efficient way to avoid
23 complex property tracing and litigation. So long as the gift is fair and the surviving
24 spouse’s choice is freely made, the surviving spouse’s decision to take the gift
25 constitutes a de facto waiver of any independent property claim.⁹⁵

26 In other cases, the forced election may be coercive and border on appropriation
27 of the surviving spouse’s property.⁹⁶ Unilateral decision making, backed by a
28 threat of forfeiture, is arguably incompatible with the fiduciary relationship that
29 spouses share with respect to the disposition of their community property.

30 The Commission invites public comment on whether the ability to use a no
31 contest clause to create a forced marital election should be continued.

32 **Elimination of Declaratory Relief**

33 By limiting the scope of application of a no contest clause to a carefully defined
34 class of “direct contests,” most of the uncertainty that arises under existing law

1931 Cal. Stat. ch 281.

94. See proposed Prob. Code § 21330 *infra*.

95. See “Use of Forced Election to Avoid Ownership Disputes” *supra*.

96. See “Misuse of Forced Election” *supra*.

1 would be eliminated. Consequently, there should be little need for pre-trial
2 declaratory relief.

3 The proposed law would delete the declaratory relief provisions. That would
4 result in significant savings to estates, heirs, and the courts.

5 **Expansion of Probable Cause Exception**

6 Existing law already provides a probable/reasonable cause exception for a
7 contest based on the following grounds:⁹⁷

- 8 • Forgery.
- 9 • Revocation.
- 10 • The beneficiary is disqualified under Probate Code Section 21350.
- 11 • The beneficiary drafted or transcribed the instrument.
- 12 • The beneficiary directed the drafter of the instrument (unless the transferor
13 affirmatively instructed the drafter regarding the same provision).
- 14 • The beneficiary is a witness to the instrument.

15 There is considerable overlap between the last four grounds, but they are all
16 aimed at the same concern, a provision that is likely to have been the product of
17 fraud or undue influence.

18 The existing probable/reasonable cause exception does not apply to a direct
19 contest brought on the following grounds: incapacity, menace, duress, or lack of
20 due execution. The Commission sees no policy reason for that distinction. The
21 proposed law would extend the existing probable cause exception to all types of
22 direct contests.⁹⁸

23 That extension of the existing exception would provide greater latitude to
24 contest an instrument that is believed to have been procured through elder abuse.

25 The proposed law provides:

26 Probable cause exists if, at the time of instituting the contest, the evidence
27 available to the person who instituted the contest would lead a reasonable person,
28 properly informed and advised, to conclude that it is more likely than not that the
29 contest will be successful.⁹⁹

30 That standard is drawn from the Restatement (Third) of Property.¹⁰⁰ It is a higher
31 standard than the standard for malicious prosecution or a frivolous appeal, which
32 would require only that a contest be “legally tenable.”¹⁰¹

97. Prob. Code §§ 21306-21307.

98. See proposed Prob. Code § 21333(c) *infra*.

99. *Id.*

100. Restatement (Third) of Property: Wills & Donative Transfers § 8.5 (2003).

101. See *In re Estate of Gonzalez*, 102 Cal. App. 4th 1296, 126 Cal. Rptr. 2d 332 (2002) (interpreting “reasonable cause” as used in Probate Code Section 21306). See also *Sheldon Appel Co. v. Albert &*

1 **Grace Period**

2 The proposed law would have a one year deferred operative date.¹⁰² That would
3 provide a grace period for those who wish to revise their estate plans before the
4 new law takes effect.

Oliker, 47 Cal. 3d 863, 254 Cal. Rptr. 336 (1989) (discussing malicious prosecution and frivolous appeal standards).

102. See Prob. Code §§ 21309 (repealing existing law), 21335 (limiting application of new law).

PROPOSED LEGISLATION

1 **Prob. Code § 21309 (added). Sunset of existing statute**

2 SECTION 1. Section 21309 is added to the Probate Code, to read:
3 21309. This part is repealed by operation of law on January 1, 2010.

4 **Comment.** Section 21309 is new. On January 1, 2010, the provisions of this part are replaced
5 by Sections 21330-21335.

6 **Prob. Code §§ 21330-21335 (added). No contest clause**

7 SEC. 2. Part 3 (commencing with Section 21330) is added to Division 11 of the
8 Probate Code, to read:

9 PART 3. NO CONTEST CLAUSE

10 **§ 21330. Definitions**

11 21330. As used in this part:

12 (a) “Contest” means a pleading in a proceeding in any court alleging the
13 invalidity of a protected instrument or one or more of its terms.

14 (b) “Direct Contest” means a contest based on one or more of the following
15 grounds:

16 (1) Forgery.

17 (2) Lack of due execution.

18 (3) Lack of capacity.

19 (4) Menace, duress, fraud, or undue influence.

20 (5) Disqualification of a beneficiary under Section 21350.

21 (6) Revocation of a will pursuant to Section 6120, revocation of a trust pursuant
22 to Section 15401, or revocation of an instrument other than a will or trust pursuant
23 to the procedure for revocation that is provided by statute or by the instrument.

24 (c) “No contest clause” means a provision in an otherwise valid instrument that,
25 if enforced, would penalize a beneficiary that files a contest.

26 (d) “Protected instrument” means all of the following instruments:

27 (1) The instrument that contains the no contest clause.

28 (2) An instrument that is expressly identified in the no contest clause as being
29 governed by the no contest clause.

30 **Comment.** Section 21330 is new. Subdivision (a) continues part of the substance of former
31 Section 21300(b), except that mistake and misrepresentation are not continued as grounds for a
32 direct contest.

33 Subdivision (b)(2) continues the substance of former Section 21305(a)(3).

34 **Note.** The Commission invites comment on whether the deletion of mistake and
35 misrepresentation as grounds for a direct contest would cause any problem. A contest based on
36 misrepresentation is largely subsumed within the ground of fraud. A pleading to reform an
37 instrument based on mistake is already exempt from the application of a no contest clause. See

1 Prob. Code § 21305(b)(11). Arguably, a pleading for rescission that is based on mistake should
2 also be exempt, as are other pleadings to determine the transferor’s intent. See Prob. Code §
3 21305(b)(1), (9).

4 **§ 21331. Application of common law.**

5 21331. This part is not intended as a complete codification of the law governing
6 enforcement of a no contest clause. The common law governs enforcement of a no
7 contest clause to the extent this part does not apply.

8 **Comment.** Section 21331 continues former Section 21301 without change.

9 **§ 21332. Effect of contrary instrument**

10 21332. This part applies notwithstanding a contrary provision in the instrument.

11 **Comment.** Section 21332 continues former Section 21302 without change.

12 **§ 21333. Enforcement of no contest clause**

13 21333. (a) A no contest clause may be enforced against a beneficiary who brings
14 a direct contest that is within the terms of the no contest clause.

15 (b) A no contest clause shall not be enforced against a contest that is not a direct
16 contest, regardless of the terms of the instrument.

17 (c) Notwithstanding subdivision (a), a no contest clause shall not be enforced if
18 the contest is brought with probable cause. Probable cause exists if, at the time of
19 instituting the contest, the evidence available to the person who instituted the
20 contest would lead a reasonable person, properly informed and advised, to
21 conclude that it is more likely than not that the contest will be successful.

22 **Comment.** Subdivision (a) of Section 21333 continues part of the substance of former Section
23 21303. See Section 21330(a) (“direct contest” defined).

24 Subdivision (b) is new. It provides an exception to the enforcement of a no contest clause for
25 any contest other than a direct contest. That continues and expands upon the public policy
26 exceptions provided in former Section 21305.

27 The definition of “probable cause” provided in subdivision (c) is drawn from the Restatement
28 (Third) of Property: Wills & Donative Transfers § 8.5 (2003).

29 **Note.** By limiting the enforcement of a no contest clause to a direct contest, the use of a no
30 contest clause to create a “forced election” is eliminated. The Commission invites comment on
31 the advantages and disadvantages of that change in the law.

32 **§ 21334. Strict construction**

33 21334. In determining the intent of the transferor, a no contest clause shall be
34 strictly construed.

35 **Comment.** Section 21334 continues former Section 21304 without change.

36 **§ 21335. Application of part**

37 21335. (a) This part becomes operative on January 1, 2010.

38 (b) This part does not apply to an instrument if either of the following conditions
39 is satisfied:

40 (1) The person who created the instrument dies before January 1, 2010.

- 1 (2) The instrument is or becomes irrevocable before January 1, 2010.
 - 2 **Comment.** Section 21335 limits the application of this part.
-